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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

## No. [redacted].114

JAMES C. DAVIS, AS AGENT, ETC., PETITIONER,

*vs.*

THE PORTLAND SEED COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1922.

CERTIORARI AND RETURN FILED DECEMBER 20, 1922.

(29,123)

# (29,123)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1922.

# No. 573.

JAMES C. DAVIS, AS AGENT, ETC., PETITIONER,

*vs.*

THE PORTLAND SEED COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 IN THE

**United States Circuit Court of Appeals for the Ninth Circuit.**

JAMES C. DAVIS, Agent United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), Plaintiff in Error,

vs.

PORTLAND SEED COMPANY, a Corporation, Defendant in Error.

**Names and Addresses of the Attorneys of Record.**

Arthur C. Spencer, Charles E. Cochran, and John F. Reilly, Wells Fargo Building, Portland, Oregon, for the Plaintiff in Error.
James G. Wilson and George B. Guthrie, Platt Building, Portland, Oregon, for the Defendant in Error.

**Citation on Writ of Error.**

[Filed Oct. 1, 1921.]

UNITED STATES OF AMERICA,
*District of Oregon, ss:*

To the Portland Seed Company, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of
2 Oregon, wherein James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Company), is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this first day of October, in the year of our Lord, one thousand nine hundred and twenty-one. R. S. Bean, Judge.

Due and legal service of the within citation is hereby admitted and acknowledged at Portland, Oregon, this 1st day of October, 1921. James G. Wilson, Attorney for Defendant in Error.

[File endorsement omitted.]

3 In the United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

**Writ of Error.**

(Filed Sept. 30, 1921.)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the District Court of the United States for the District of Oregon, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The Portland Seed Company, a corporation, plaintiff and defendant in error, and James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Lines), defendant and plaintiff in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be herein given, that

4 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, this 30th day of September, 1921. G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, by F. L. Buck, Chief Deputy. [Seal.]

Service of the above Writ of Error made this 30th day of September, 1921, upon the District Court of the United States for the District of Oregon, by filing with me as Clerk of said Court a duly certified copy of said Writ of Error. G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, by F. L. Buck, Chief Deputy.

5 [File endorsement omitted.]

In the District Court of the United States for the District of Oregon.

November Term, 1920.

Be it remembered, That on the 20th day of December, 1921, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follow, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

6 **Complaint at Law.**

[Filed Dec. 20, 1920.]

Comes now the plaintiff and for cause of action against the defendant alleges:

I.

That the plaintiff is now and during all of the times hereinafter complained of was a corporation duly organized and existing under and by virtue of the laws of the state of Oregon.

II.

That the Oregon-Washington Railroad & Navigation Company is now, and during all of the times hereinafter complained of was, a railroad corporation duly organized and existing and owning, among other lines, a line of railroad extending from Huntington in the state of Oregon to Walla Walla and to Yakima in the state of Washington. That at Huntington, Oregon, the line of railroad of the Oregon-Washington Railroad & Navigation Company connects with the line of railroad of the Oregon Short Line Railroad Company, which extends from Granger, Wyoming, to Huntington. That the Union Pacific Railroad Company own the line of railroad, and at all times hereinafter complained of owned the line of railroad extending from Denver in the state of Colorado to Granger in the state of Wyoming, at which point it connects with said line of Oregon Short Line Railroad Company. That the Atchison, Topeka & Santa Fe Railway Company is and at all times hereinafter complained of was the owner of a line of railroad from Roswell, New Mexico, to Denver, in the state of Colorado, at which
7 point said line connects with the line of the said Union Pacific Railroad Company.

III.

That during all of the times hereinafter complained of, the United States Railroad Administration was in control of the said lines of

railroad of the Oregon-Washington Railroad & Navigation Company, the Oregon Short Line Railroad Company, the Union Pacific Railroad Company, and the Atchison, Topeka & Santa Fe Railway Company, and was operating the same as a common carrier in Interstate Commerce under the authority of the United States and the Director General of Railroads, and pursuant to its tariffs, rules, and regulations for said purpose adopted and provided. That pursuant to the Acts of Congress and his appointment by the President of the United States, defendant John Barton Payne is now the duly appointed, qualified, and acting agent of said United States Railroad Administration and authorized to represent it in the defense of this action.

IV.

That this is an action or proceeding arising under section 1 of the Act of Congress to regulate commerce as amended, which provides "that it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being in-
8 cluded within the longer distance," and is within the jurisdiction of this court.

V.

That heretofore and on or about the 19th day of December, 1918, there was delivered unto the United States Railroad Administration, by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell, at Yakima, designated in the bill of lading as North Yakima, in the state of Washington, with directions to notify the Portland Seed Company at Yakima, designated in said bill of lading as North Yakima in the state of Washington, 345 bags of alfalfa seed weighing 60,281 pounds, and said Railroad Administration accepted the same from the said E. W. Mitchell and loaded the same in M. K. & T. car #87309 and issued therefor its certain order Bill of Lading, by the terms of which said Railroad Administration undertook, subject to the classifications and tariffs in effect on the date of the issue of said Bill of Lading, to transport to Yakima, Washington, and deliver on surrender of the said Bill of Lading and payment of its lawful charges accruing under the tariffs of said Railroad Administration in effect covering said transportation.

VI.

That said United States Railroad Administration transported said seed over the lines of the said Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Naviga-

tion Company, from Roswell, New Mexico, to Yakima, Wash-
9 ington, and there delivered the same to the plaintiff on sur-
render of the said original Bill of Lading, and collected therefor the sum of $1,720.35, including war tax, which said sum was paid at Yakima, Washington, by plaintiff on the 8th day of January, 1919.

VII.

That prior to the transportation of said shipment, the United States Railroad Administration had adopted a schedule of rates for the transportation of commodities, including alfalfa seed from points in Texas, including Pecos, Texas, to points in Washington, including Yakima, Washington, and had filed such schedule with the Interstate Commerce Commission and is contained in Transcontinental Freight Bureau, West Bound Tariff No. 4-0, I. C. C. No. 1049 of R. H. Countis, agent, and supplements thereto, including Supplement No. 4, which said original tariff was issued February 21, 1918, and became effective March 15, 1918, and which said supplement was issued March 15, 1918, and became effective April 30, 1918, and provides rates for the transportation of Alfalfa seed from Pecos, Texas, to Yakima, Washington, over the lines of railroad of the Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company, together with the lines of other carriers on the route through Roswell, New Mexico, Denver, Colorado, Granger, Wyoming, Huntington, Oregon, thence to destination. That in and by said schedule of rates so
10 filed, the rate for the transportation of alfalfa seed from Pecos, Texas, to Yakima, Washington, was and is the sum of $1.21 per hundred pounds. That thereafter, the said Railroad Administration by General Order 28, issued May 25, 1918, made effective June 25, 1918, increased the rate on alfalfa seed between said points twenty-five (25) per cent, and said schedule of rates as so modified and increased was in full force and effect at all times subsequent thereto up to and subsequent to the delivery and transportation of said alfalfa seed as hereinabove alleged, and governed the rate applicable to said shipment.

VIII.

That Pecos, Texas, is a point on the line of the Panhandle & Santa Fe Railway Company and part of the Atchison, Topeka & Santa Fe lines and is on the line of said companies leading south from Clovis, New Mexico, into Texas, and is a more distant point from Yakima, Washington, than is Roswell, New Mexico, and the said Roswell, New Mexico, is intermediate between Yakima, Washington, and Pecos, Texas.

IX.

That no application had been made by the Railroad Administration or by the carriers owning the lines between Pecos, Texas, and

Yakima, Washington, and Roswell, New Mexico, and Yakima, Washington, to the Interstate Commerce Commission for permission to charge less for shipments of alfalfa seed from Pecos, Texas, to Yakima, Washington, and no investigation or hearing has
11 been had on any such application and no permission or authority given by the Commission to charge less for shipments of alfalfa seed from Pecos, Texas, to Yakima, Washington, than from Roswell, New Mexico, to Yakima, Washington, and said United States Railroad Administration and said carriers owning the lines between Pecos, Texas, and Yakima, Washington, were at the time of the shipment hereinabove alleged prohibited from charging more for shipments of alfalfa seed from Roswell, New Mexico, to Yakima, Washington, than the rate adopted and in force for the transportation of Alfalfa seed from Pecos, Texas, to Yakima, Washington, the said transportation being over the same line or route in the same direction, the shorter distance being included within the longer. That the lawful charge so adopted by the United States Railroad Administration and in force at the time of the transportation of the Alfalfa seed hereinabove referred to and applicable to shipments from Pecos, Texas, to Yakima, Washington, on shipments of alfalfa seed of 60,300 pounds, including the war tax, is the sum of $940.95, and any charge in excess thereof for transportation of the shipment herein involved from Roswell, New Mexico, to Yakima, Washington, was illegal and exacted by the United States Railroad Administration without right or authority. That subsequent to the said charge of $1,720.35 for said transportation, said Railroad Administration has refunded to the plaintiff the sum of $408.31 and no more, which said sum was paid to plaintiff on the 21st day of July, 1919.
12 X.

That the plaintiff by such unlawful exaction has been damaged in the sum of $371.09 and has been deprived of the use thereof since the date of such execution, to wit: the 8th day of January, 1919, and is entitled to recover the same with interest at the rate of six per cent (6%) per annum from the said 8th day of January, 1919.

For a second cause of action plaintiff alleges:

I.

Plaintiff repeats and incorporates herein as a part of this cause of action as if set out at large paragraphs 1, 2, 3, and 4 of plaintiff's first cause of action.

II.

That heretofore and on or about the 4th day of January, 1919, there was delivered unto the United States Railroad Administration by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell, at Walla Walla, Washington, with directions to notify the Portland Seed Company at Walla, Walla, Washington,

196 bags of Alfalfa seed weighing 34,538 pounds, and said Railroad Administration accepted the same from the said E. W. Mitchell and loaded the same into M. K. & T. Car No. 93666 and issued therefor its certain order Bill of Lading, by the terms of which said Railroad Administration undertook, subject to the classifications and tariffs in effect on the date of the issue of said Bill of Lading, to transport said shipment to Walla Walla, Washington, and deliver the same on surrender of said Bill of Lading and payment of its law-
13 ful charges accruing under the tariff of said Railroad Administration in effect covering said transportation.

III.

That said United States Railroad Administration transported said seed over the lines of the said Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad Company, and Oregon-Washington Railroad & Navigation Company by way of Denver, Granger, and Huntington from Roswell New Mexico, to Walla Walla, Washington, and there delivered the same to the plaintiff on surrender of said Bill of Lading and collected therefor the sum of $823.57, including war tax, which said sum was paid by the plaintiff to the United States Railroad Administration at Walla Walla, Washington, on the 24th day of January, 1919.

IV.

That prior to the transportation of said shipment, the United States Railroad Administration had adopted a schedule of rates for the transportation of commodities, including alfalfa seed, from points in Texas, including Pecos, Texas, to points in Washington, including Walla Walla, Washington, and had filed such schedule with the Interstate Commerce Commission, and which said schedule is contained in Transcontinental Freight Bureau, West Bound Tariff No. 40, I. C. C. No. 1049, of R. H. Countis, Agent, and supplements thereto, including Supplement No. 4, which said original tariff was issued February 21, 1918, and became effective March 15,
14 1918, and which said supplement was issued March 15, 1918, and became effective April 30, 1918, and provides rates for the tranportation of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, over the said lines of railroad of the Atchison, Topeka & Santa Fe Railway Company, Union Pacific Railroad Company, Oregon Short Line Railroad and Oregon-Washington Railroad & Navigation Company, together with the lines of other carriers, including the Panhandle & Santa Fe Railway Company on the route through Roswell, New Mexico, Denver, Colorado, Granger, Wyoming, Huntington, Oregon, thence to destination. That in and by said schedule of rates so filed and published, the rate for the transportation of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, was and is the sum of $1.21 per hundred pounds. That thereafter, the said Railroad Administration by General Order 28,

issued May 26, 1918, and made effective June 25, 1918, increased the rate on Alfalfa seed between said points twenty-five per cent (25%), and said schedule of rates as so modified and increased was in full force and effect at all times subsequent thereto and up to and subsequent to the delivery and transportation of said Alfalfa seed, as hereinbefore alleged, and governed the rate applicable to said shipment.

V.

That Pecos, Texas, is a point on the line of the Panhandle & Santa Fe Railway Company and part of the Atchison, Topeka & Santa Fe Lines, and is on the line of said companies leading south from Clovis, New Mexico, into Texas, and is a more distant point from Walla Walla, Washington, than is Roswell, New Mexico, and the said Roswell, New Mexico, is intermediate between Walla Walla, Washington, and Pecos, Texas, on the line over which said shipment moved and over which said rate applied, as hereinbefore alleged, from Pecos, Texas, to Walla Walla, Washington.

VI.

That no application had been made by the United States Railroad Administration or by the carriers owning the lines between Pecos, Texas, and Walla Walla, Washington, and Roswell, New Mexico, and Walla Walla, Washington, to the Interstate Commerce Commission for permission to charge less for shipments of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, and no investigation or hearing has been had on any such application and no permission or authority has been given by the Commission to charge less for shipments of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, than from Roswell, New Mexico, to Walla Walla, Washington, and said United States Railroad Administration and said carriers owning the lines between Pecos, Texas, and Walla Walla, Washington, were at the time of the shipment hereinabove alleged, prohibited from charging more for shipments of Alfalfa seed from Roswell, New Mexico, to Walla Walla, Washington, than the rate adopted and in force for the transportation of Alfalfa seed from Pecos, Texas, to Walla Walla, Washington, the said transportation being over the same line or route in the same direction, the shorter distance being included within the longer, to which the said rate applies. That the lawful charge so adopted by the United States Administration and in force at the time of the transportation of the Alfalfa seed hereinbefore referred to and applicable to shipments from Pecos, Texas, to Walla Walla, Washington, on 34,538 pounds, the weight of the shipment, including the war tax, is the sum of $538.95, and any charge in excess thereof for transportation of the shipment herein involved, from Roswell, New Mexico, to Walla Walla, Washington, was illegal and exacted by the United States Railroad Administration without right or authority. That subsequent to said charge of $823.57 for said

transportation, said Railroad Administration has refunded to the plaintiff the sum of $106.75, together with 52¢ interest thereon and no more, which said sum was paid to plaintiff on the 24th day of January, 1919.

VII.

That plaintiff, by unlawful exaction, has been damaged in the sum of $177.87 and has been deprived of the use of said sum since the date of such exaction, to wit, the 24th day of January, 1919, and is entitled to recover the same from defendant with interest at the rate of six per cent (6%) per annum from the said 24th day of January, 1919.

Wherefore, plaintiff prays judgment against the defendant for the sum of $548.96, together with interest at the rate of 6% per annum on the sum of $371.09 from the 8th day of January, 1919, and together with interest on the sum of $177.87 at the rate of 6% per annum from the 24th day of January, 1919, together with plaintiff's costs and disbursements incurred herein. Wilson & Guthrie, Attorneys for Plaintiff.

STATE OF OREGON,
*County of Multnomah, ss:*

I, E. C. Johnson, being first duly sworn, on my oath depose and say that I am President of the plaintiff, Portland Seed Company; that I have read the foregoing complaint, know the facts therein stated and that the same are true as I verily believe. F. C. Johnson, Pres.

Subscribed and sworn to before me this 18th day of December, 1920. F. W. Nelson, Notary Public for Oregon. [Seal.] My commission expires May 1, 1924.

[File endorsement omitted.]

And afterwards, to wit, on the 29th day of January 1921, there was duly filed in said Court, an answer, in words and figures as follows, to wit:

18 In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Answer.**

(Filed Jan. 29, 1921.)

Comes now the defendant and for answer to plaintiff's complaint herein, admits, denies, and alleges as follows, to wit:

I.

Admits the allegations contained in paragraphs I, II, and III of the Complaint.

II.

Denies each and every allegation contained in paragraph IV of the complaint, except that it is admitted that section 4 of the Act to Regulate Commerce, as amended, provides that it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance.

19 III.

Denies each and every allegation contained in paragraph V of the complaint, except that it is admitted that on or about the 19th day of December, 1918, E. W. Mitchell delivered to the United States Railroad Administration, at Roswell, New Mexico, a shipment said to be and contain three hundred forty-five bags of alfalfa seed, weighing 60,281 pounds, and same was loaded into MK&T car 87309, and consigned to the order of E. W. Mitchell at Yakima, Washington. Admits that the United States Railroad Administration undertook to transport said shipment subject to the classifications and tariffs in effect on the date of the issuance of the bill of lading covering said shipment.

IV.

Admits the allegations contained in paragraph VI of the complaint.

V.

Denies the allegations contained in paragraph VII of the complaint and the whole thereof, except that it is admitted that the United States Railroad Administration had duly filed and published with the Interstate Commerce Commission, as required by law, trans-

Continental Freight Bureau West-Bound tariff 4-0, I. C. C. No. 1049, of H. H. Countiss, Agent, and supplements thereto, including Supplement No. 4. Admits that said tariff was issued February 21, 1918, and became effective March 15, 1918. Admits that said supplement was issued March 15, 1918, and became effective
20 April 30, 1918, and except it is admitted that said tariffs provided rates for the transportation of alfalfa seed from Pecos, Texas, to Yakima, Washington, over the lines of railroad of the A. T. & S. F. Railway Company, U. P. Railroad Company, O. S. L. R. R., and O.-W. R. & N. Company. Admits that the rates on alfalfa seed from Pecos, Texas, to Yakima, Washington, were the rates named in said tariffs, as increased by General Order No. 28, effective June 25, 1918.

VI.

Admits the allegations contained in paragraph VIII of the complaint.

VII.

Denies each and every allegation contained in paragraph IX of the complaint, except that it is admitted that the United States Railroad Administration has refunded to the plaintiff the sum of $408.31, on account of said shipment, and admits that said refund was made on or about the 21st day of July, 1919.

VIII.

Denies each and every allegation contained in paragraph X of the complaint, and the whole thereof.

And for answer to plaintiff's second cause of action set forth in said complaint, the defendant admits, denies, and alleges as follows, to wit:

I.

Answering paragraph I of the second cause of action, defendant hereby repeats and incorporates herein all of the admissions
21 and denials contained in paragraphs I and II of defendant's answer to the first cause of action.

II.

Admits the allegations contained in paragraphs II and III of the second cause of action.

III.

Denies each and every allegation contained in paragraph IV of the second cause of action, and the whole thereof, except that it is admitted that Trans-Continental Freight Bureau West-Bound Tariff

4-0 I. C. C. 1049, of R. H. Countiss, Agent, and supplements thereto, including Supplement #4, were duly published and filed with the Interstate Commerce Commission, as required by law, and said original tariff became effective March 15, 1918, and said supplement became effective April 30, 1918. Admits that said tariffs provided rates for transportation of alfalfa seed from Pecos, Texas, to Walla Walla, Washington, over the lines of railroad of the A. T. & S. — Ry. Company, U. P. Ry., O. S. L. R. R., and O.-W. R. & N. Co. Admits that the rate on alfalfa seed from Pecos, Texas, to Walla Walla, Washington, is shown in said tariffs, and that said rates were increased by the United States Railroad Administration by General Order No. 28, effective June 25, 1918.

IV.

Admits the allegation contained in paragraph V of the second cause of action.

V.

Denies each and every allegation contained in paragraph
22 VI of the second cause of action, except that it is admitted that subsequent to the payment of the charges on said shipment, United States Railroad Administration refunded to the plaintiff the sum of $107.27. Admits that said refund was paid on the 24th day of December, 1919.

VI.

Denies each and every allegation contained in paragraph VII of the second cause of action, and the whole thereof.

Wherefore, having fully answered plaintiff's complaint herein, this defendant prays that this action be dismissed, and it have and recover its costs and disbursements herein. John F. Finerty, A. C. Spencer, W. A. Robbins, Attorneys for Defendant.

STATE OF OREGON,
*County of Multnomah, ss:*

I, W. A. Robbins, being first duly sworn, depose and say: That I am one of the attorneys for the defendant in the above-entitled case, and that I am authorized to make this verification for and on behalf of said defendant for the reason that said defendant is not within Multnomah county, Oregon, and capable of making this affidavit; that I have read the foregoing answer, know the contents thereof, and the same is in all respects true, as I verily believe. W. A. Robbins.

23 Subscribed and sworn to before me this 28th day of January, A. D. 1921. F. J. Betz, Notary Public for Oregon. [Seal.] My commission expires February 1. 1924.

Service by copy admitted at Portland, Oregon, January 29, 1920. James G. Wilson, Solicitor for plaintiff.

[File endorsement omitted.]

And afterwards, to wit, on the 8th day of March 1921, there was duly filed in said Court, a demurrer to the complaint in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Demurrer.**

[Filed Mar. 8, 1921.]

Comes now the above-named defendant, and demurs to the complaint on file herein on the ground

24 I.

That the Court has no jurisdiction of the subject matter of the action.

Defendant will rely, in presenting this demurrer, on the proposition that the Interstate Commerce Commission has exclusive original jurisdiction of controversies of this character. A. C. Spencer, W. A. Robbins, Attorneys for Defendant.

STATE OF OREGON,
*County of Multnomah, ss:*

I, W. A. Robbins, one of attorneys for defendant, hereby certify that in my opinion the foregoing demurrer is well founded in law. W. A. Robbins.

Service by copy admitted at Portland, Oregon, March 8, 1921. James G. Wilson, Solicitor for Plaintiff.

[File endorsement omitted.]

And afterwards, to wit, on the 10th day of March 1921, there was duly filed in said Court, a stipulation to withdraw answer and to substitute demurrer to complaint, in words and figures as follows, to wit:

25 In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Stipulation to Withdraw Answer and to Substitute Demurrer to Complaint.**

[Filed Mar. 10, 1921.]

It is hereby stipulated and agreed, by and between Jas. G. Wilson, one of the attorneys for the plaintiff, and W. A. Robbins, one of the attorneys for the defendant, that the defendant may withdraw from the files in the above-entitled court and cause, the Answer to said complaint heretofore filed by the defendant, and substitute in lieu thereof defendant's demurrer to said complaint. James G. Wilson, of Attorneys for Plaintiff. W. A. Robbins, Attorney for Defendant.

[File endorsement omitted.]

26 And afterwards, to wit on Monday, the 4th day of April, 1921, the same being the 25th judicial day of the Regular March term of said court. Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Order Overruling Demurrer to Complaint.**

[Filed Apr. 4, 1921.]

This matter coming on to be heard on demurrer of defendant to plaintiff's complaint, the plaintiff appearing by Wilson & Guthrie, his attorneys, and the defendant appearing by A. C. Spencer, J. F. Reilly, and W. A. Robbins, its attorneys, the matter having been fully argued, the court being fully advised in the premises:

It is ordered that said demurrer be and the same is hereby overruled, and that defendant have ten (10) days from date hereof within which to serve and file its answer

27 Done and dated in open court this 4th day of April, 1921.

And afterwards, to wit, on the 4th day of April 1921, there was duly filed in said Court, an opinion on the demurrer to complaint, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

L–8748.

A. J. Parrington, Plaintiff,

vs.

San Francisco and Portland Steamship Company, a Corporation, Defendant.

L–8747.

A. J. Parrington, Plaintiff,

vs.

John Barton Payne, Agent United States Railroad Administration (San Francisco & Portland Steamship Company), Defendant.

28

L–8723.

The Portland Seed Company, a Corporation, Plaintiff,

vs.

John Barton Payne, Agent United States Railroad Administration (Oregon-Washington Railroad & Navigation Company), Defendants.

**Memorandum Opinion on Demurrer to Complaint.**

[Filed Apr. 4, 1921.]

Portland, Oregon, April 4, 1921.

*Memorandum by Bean, District Judge.*

Demurrers in these three cases were argued and submitted together and will be so disposed of by this memorandum.

The first case is an action to recover as damages the difference between the rates charged plaintiff's assignors by defendant steamship company on shipment of sugar from San Francisco to Astoria and Portland, and the rate on the same commodity charged by the defendant to North Portland, a longer distance. Part of the shipments moved prior to Federal control of the carriers and the rest after the termination thereof.

The second case is an action against the Director General of Railroads and covers shipment of sugar over the same line between the same points.

The third case is a similar action against the Director General of Railroads, covering a shipment of alfalfa from Roswell, New Mexico, to Yakima and Walla Walla, Washington.

29

The theory of the complaints is that Portland and Astoria in the first two cases are intermediate points between San Francisco and North Portland, and Roswell in the third case is an intermediate point between Pecos, Texas, and Yakima and Walla Walla; and as the rates charged for transportation to these intermediate points were greater than the tariff rates applicable to similar shipments to North Portland, a more distant point, in the first two cases, and from Pecos, Texas, a more distant point in the third case, than the intermediate point, the carriers thereby violated section 4 of the Interstate Commerce Act, commonly known as the Long & Short Haul Clause.

Demurrers have been interposed to the various complaints on the ground (1) that the court is without jurisdiction of the subject matter because exclusively original jurisdiction is lodged in the Interstate Commerce Commission; (2) in the first case the complaint does not state facts sufficient to constitute a cause of action and (a) the right of action on all claims arising prior to January 1, 1918, the beginning of federal control, is barred by the statute of limitations.

The right of a shipper to maintain an action against a carrier, subject to the provisions of the Interstate Commerce Act, to recover damages for violation of section 4 (36 Stat. at L. 547), in charging and receiving greater compensation for the transportation of
30 like kind of property for a shorter than a longer distance over the same line or route, in the same direction, the shorter being included within the longer distance, is ruled, as far as this court is concerned, by the decision of the Court of Appeals in S. P. v. Cal. Adjustment Co., 237 Fed. 954, holding that under a similar law of California the injured party could sue in the courts without first applying to the Commission for relief. There are two classes of acts which may form the basis for a proceeding for damages against a carrier under the Interstate Commerce Act: one where the legal quality of the practices complained of is not definitely fixed by statute, but is an administrative question depending upon the facts to be ascertained from investigation, in which case the Commission has original jurisdiction. (Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426; B. & O. R. R. v. U. S., 215 U. S. 481; Robinson v. B. & O., 222 U. S. 506; Mitchell Coal v. Penn. R. R., 230 U. S. 247; Morrisdale Coal v. Penn. R. R., 230 U. S. 304; Tex. & Pac. v. American Tie Co., 234 U. S. 138; N. P. v. Solum, 247 U. S. 477.) The other where the act complained of is directly prohibited by statute. In such the injured party may sue without previous action by the Commission, because the court can apply the laws to the facts of the case. (Penn. R. R. v. International Coal, 230 U. S. 184; Penn. R. R. v. Puritan Coal, 237 U. S. 121; Penn. R. R. v. Sonmer, 242 U. S. 120.)

As the long and short haul clause of the Interstate Com-
31 merce Act prohibits the charging and receiving by a carrier of a greater compensation for shorter than it charges for transportation of a like kind of property for a longer distance over the same line or route, in the same direction, the acts complained of in these cases are prohibited by statute, and the injured

party may in my judgment sue without first applying to the Commission for relief.

(2) The Shipments involved in two of the cases were by water from San Francisco to Portland and it is claimed that the Interstate Commerce Act does not apply to such a transportation. The act to regulate commerce as it existed prior to 1912 probably did not, but it was amended in that year (37 Stat. 566) by providing in substance that from and after the first day of July, 1914, it should be unlawful for any railroad company or other common carrier subject to the act to own, lease, operate, or control, or have any interest whatever in any common carrier, by water, operated through the canal or otherwise, with which the railroad does or may compete for traffic, unless the Interstate Commerce Commission should be of the opinion that any existing specific service by water is being operated in the interest of the public, other than through the canal, and is of advantage to the commerce and convenience of the public, in which case it was authorized by order to extend the time during which such service may be continued to be operated beyond the first of July, 1914, and "in every extension the rates, sched-
32 ules, and practices of such water carrier shall be filed with the Interstate Commerce Commission, and shall be subject to the Act to Regulate Commerce, and all amendments thereto, in the same manner and to the same extent as the railroad or the common carrier controlling such water carrier or interested in any way in its operation."

It is alleged in the complaints that the O.-W. R. & N. R. R. is and was the owner of the stock and controlled the defendant steamship company at the times complained of and that it had applied to and obtained authority from the Commission to continue the service. The steamship company was therefore within the terms of the Interstate Commerce Act and subject to its provisions.

3. It is urged that the action is barred as to shipments moving prior to federal control, by section 16 of the Interstate Commerce Act as amended in 1910 (36 Stat. 554), which provides that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued and not after." This provision is, by its language, confined to complaint filed with the Commission, and although there is some expression in the opinion of the court in Phillips v. Grand Trunk (236 U. S. 662) which lends support to the view that it is applicable to actions brought in the courts, I am not prepared to so hold. But however that may be, the Transportation Act (sec. 206, subdiv. *f*, 41 Stat. at L. 462) declared that "the period of
33 federal control shall not be computed as a part of the period of limitation in acts against carriers or any claims for reparation to the Commission for a cause of action arising prior to federal control," and this operated to toll the statute. (Opinion of Judge Rudkin, in Wenatchee Produce Co. v. Great Northern Ry. Co.)

4. As to freight moving while defendant was under federal control, it is urged that because the President is given authority to initiate rates (40 Stat. at L. 456) which shall not be suspended by the Commission pending final determination, rates theretofore established by the carriers and maintained by the President became legal regardless of whether they complied with the provisions of the Interstate Commerce Act. The federal control act provides that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal law, except in so far as may be inconsistent with the provisions of the act or any other act applicable to federal control or with any order of the President.

It would seem therefore that the only exception made as to the rates initiated by the President is that they shall not be suspended by the Commission pending final determination. In all other respects they are subject to the various applicable provisions of law.

5. It is urged that under the provisions of the Transpor-
34 tation Act, all claims for damages by reason of the collection or enforcement by or through the president during the period of federal control, of rates, fares, etc., must be by application to the Commission and not to the court. Section 206, subdiv. *a*, of the act, provides that actions at law, suits in equity, and proceedings in admiralty based on causes of action arising out of the possession, use, or operation by the president of the railroad or system of transportation of any carrier of such character as prior to federal control could have been brought against the carrier may, after the termination of federal control, be brought against an agent designated by the President for such purpose. Subdivision B provides for process in such cases; subdivision C, for proceedings before the Commission; subdivision D, that any pending action shall not be abated; subdivision E, for payment of final judgment, decree, or awards in actions, suits, proceedings, or reparation claims; subdivision F, takes the period of federal control out of the statute of limitations; and subdivision G forbids an execution against the property of the carrier. In other words, the Transportation Act does not change the jurisdiction of any cause of action on account of the subject matter, but provides for the bringing of proceedings against the agent appointed by the President in the same tribunal which would have had jurisdiction of the subject matter but for federal control.

As the present actions could have been *maintain* this court
35 against the carrier if the lines had been in private control at the time the shipments were made, they can proceed against the agent of the President with reference to shipments moving during the period of federal control.

6. It is urged as to shipments moving subsequent to federal control, that section 208-*a* of the Transportation Act legalizes the rates, fares, and charges then in effect, but this provision did not and was not intended to legalize unlawful rates, but to continue in effect only such rates as were authorized by law. The rates in-

volved in this controversy were never lawfully established, and in fact are in violation of section 406 of the Transportation Act.

The demurrer in each case is therefore overruled.

[File endorsement omitted.]

And afterwards, to wit, on the 26th day of April, 1921, there was duly filed in said Court, a stipulation to substitute James C. Davis, as Agent of the United States Railroad Administration as defendant, in words and figures as follows, to wit:

36 In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Stipulation to Substitute James C. Davis, Agent, United States Railroad Administration, as Defendant.**

(Filed Apr. 26, 1921.)

It is hereby stipulated by and between the parties hereto by their respective attorneys that James C. Davis as agent of the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines) be substituted in place of John Barton Payne, Agent of the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), due to the appointment of said James C. Davis in place of said John Barton Payne as such agent. James G. Wilson, of Attorneys for Plaintiff. John F. Reilly, Attorneys for Defendant.

[File endorsement omitted.]

37 And afterwards, to wit, on Wednesday, the 26th day of April, 1921, the same being the 44th judicial day of the Regular March term of said Court. Present: The Honorable Charles E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Order Substituting James C. Davis, Agent, as Defendant.**

(Filed Apr. 26, 1921.)

Based upon stipulation of the parties, it is hereby ordered that James C. Davis as agent of the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines) be and is hereby substituted as defendant for John Barton Payne, Agent of

the United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines).

38 Done and dated in open court this 26th day of April, 1921. Chas. E. Wolverton, Judge.

[File endorsement omitted.]

And afterwards, to wit on the 31st day of May, 1921, there was duly filed in said Court, findings of fact and conclusions of law, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

No. L-8723.

[Title omitted.]

**Findings of Fact and Conclusions of Law.**

(Filed May 31, 1921.)

This matter coming on for trial on the 31st day of May, 1921, the plaintiff appearing by James G. Wilson, its attorney, and the defendant appearing by Charles E. Cochran, his attorney, the evidence having been submitted, the Court being fully advised does make the following

39 *Findings of Fact.*

I.

On the 19th day of December, 1918, there was delivered to the United States Railroad Administration by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell at Yakima, Washington, with directions to notify the Portland Seed Company at Yakima, three hundred forty-five (345) bags of alfalfa seed weighing 60,281 pounds, and said Railroad Administration accepted and transported the same over the line of the A. T. & S. F. Railroad Company to Denver, Colorado, thence via the U. P. Railroad Company's line to Granger, Wyoming, thence via the O. S. L. Railroad Company's line to Huntington, Oregon, thence via the O. W. R. & N. Company to Yakima, Washington, and delivered the same to the Portland Seed Company upon surrender of the bill of lading endorsed by E. W. Mitchell, and collected therefor the sum of Seventeen Hundred Twenty and 35/100 Dollars ($1,720.35), including war tax; that said property was the property of the Portland Seed Company, plaintiff herein, and said freight charges were paid by the Portland Seed Company, and that no part of said freight charges have been refunded to the plaintiff except the sum of Four Hundred Eight and 31/100 ($408.31) Dollars.

II.

That there was delivered to the United States Railroad Administration on January 4, 1919, by E. W. Mitchell, at Roswell, New Mexico, consigned to the order of E. W. Mitchell, at Walla Walla, Washington, with directions to notify the Portland Seed Company at Walla Walla, one hundred ninety-six (196) bags of alfalfa seed weighing 34,538 pounds, which said shipment was accepted and transported by the Railroad Administration from Roswell, New Mexico, to Walla Walla, Washington, over the line of the A. T. & S. F. Railroad Company to Denver, Colorado, thence via the line of the U. P. Railroad Company to Granger, Wyoming, thence via the line of the O. S. L. Railroad Company to Huntington, Oregon, thence via the line of the O.-W. R. & N. to Walla Walla, Washington, and delivered the same to the Portland Seed Company upon surrender of the bill of lading endorsed by E. W. Mitchell, and collected as freight charges thereon the sum of Eight Hundred Twenty-three and 57/100 Dollars ($823.57), including war tax, which said sum was paid by the Portland Seed Company, plaintiff herein, and that no part of the said freight charges have been refunded except the sum of One Hundred Six and 75/100 Dollars ($106.75); and that said alfalfa seed was the property of the Portland Seed Company.

III.

That at the time of said shipments designated in paragraphs I and II above, there was established and in effect over the lines designated above from Pecos, Texas, to Walla Walla and Yakima, Washington, a rate of one and 51½/100 dollars ($1.51½) per cwt.

IV.

That Pecos, Texas, is a point more distant from Walla Walla, and Yakima, Washington, over the route on which said shipments moved than Roswell, New Mexico; that the said Railroad Administration had not secured any permission from the Interstate Commerce Commission to charge a higher rate for transportation of alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, Washington, than from Pecos, Texas, over said route.

V.

That the only lawful charge established for the transportation of alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, Washington, over said route was at the time of said shipment the rate in effect from Pecos, Texas, to the same points, and the charge for the shipment to Yakima including war tax should not have exceeded the sum of Nine Hundred Forty & 66/100 ($940.66) Dollars, and the charge on the shipment to Walla Walla

should not have exceeded the sum of Five Hundred Thirty-seven & 92/100 ($537.92); that the plaintiff was overcharged on said shipment to Yakima, Washington, no part of which has been refunded, the sum of Three Hundred Seventy-one & 9/100 ($371.09) Dollars, and on the shipment to Walla Walla, Washington, the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars, no part of which has been refunded; that the plaintiff has been damaged by the exaction of said rates in the sum of Three Hundred Seventy-one & 9/100 ($371.09) Dollars on the shipment to Yakima,
42 and the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars on the shipment to Walla Walla, that the freight charges on the first shipment were paid on the 8th day of January, 1919, and on the second shipment on the 24th day of January, 1919.

VI.

That a reasonable attorney's fees for the collection of said overcharge is the sum of One Hundred Seventy-five ($175.00) Dollars, which the court taxes and allows to plaintiff as a part of the costs herein.

*Conclusions of Law.*

Based upon the foregoing findings of fact, the Court finds as conclusion of law that the Railroad Administration exacted from the plaintiff for charges on the shipment to Yakima, Washington, illegally the sum of $371.09, and on the shipment to Walla Walla, Washington, illegally the sum of $177.87, and the plaintiff is entitled to recover the same with interest at the rate of six per cent per annum from the date of payment thereof, together with the sum of $175.00 as attorney's fees which the court taxes and allows to plaintiff as costs herein, and further costs and disbursements incurred by the plaintiff to be taxed.

Done and dated in open court this 31st day of May, 1921. R. S. Bean, Judge.

[File endorsement omitted.]

43 Service by copy admitted at Portland, Oregon, June 1, 1921. C. E. Cochran, Attorney for Defendant.

And afterwards, to wit on Tuesday, the 31st day of May, 1921, the same being the 74th Judicial day of the Regular March Term of said Court. Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Judgment.**

[Filed May 31, 1921.]

This matter coming on for trial on the 31st day of May, 1921, the plaintiff appearing by James G. Wilson, its attorney, and the defendant appearing by Charles E. Cochran, his attorney,
44 evidence having been submitted, the Court having signed and filed its findings of fact and conclusions of law on said evidence, which said findings of fact and conclusions of law are in favor of the plaintiff and against the defendant, the said trial being had before the court without a jury, based on said findings of fact and conclusions of law,

It is ordered and adjudged that the plaintiff have and recover of and from the defendant the sum of Five Hundred Forty-eight & 96/100 ($548.96) Dollars, together with interest at the rate of six per cent per annum on the sum of $371.09 from January 8, 1919, and with interest on the sum of $177.87 at the rate of six per cent per annum from the 24th day of January, 1919, and the further sum of $175.00 as attorney's fees, together with the further costs and disbursements of plaintiff taxed and allowed in the sum of Fifteen 96/100 —; and it is further adjudged that the defendant pay said sums promptly to the plaintiff as required by Section 206 of the Transportation Act of 1920.

Done and dated in open court this 31st day of May, 1921. R. S. Bean, Judge.

[File endorsement omitted.]

Service by copy admitted at Portland, Oregon, June 1, 1921. C. E. Cochran, Attorney for Defendant.

45 And afterwards, to wit, on the 2d day of June 1921, there was duly filed in said Court, objections to findings of fact and conclusions of law, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Objections to Findings of Fact and Conclusions of Law.**

[Filed June 2, 1921.]

Defendant, by Charles E. Cochran one of his attorneys, objects to the Findings of Fact and Conclusions of Law requested by the plaintiff, that is to say:

## Defendant's Objections.

I.

Defendant objects to proposed findings of fact No. III in respect to the rate on the shipments referred to in paragraph- I and II of the proposed finding of fact from Pecos, Texas to Walla Walla and Yakima, Washington, respectively, of One & 51½/100 ($1.51½) Dollars per cwt. alleging said finding to be immaterial to the proper issues in this case.

46

II.

Defendant objects to proposed finding of fact No. IV in effect reciting that Pecos, Texas, is a point more distant from Walla Walla and Yakima, respectively, over the route on which shipments moved than Roswell, New Mexico, alleging said finding to be immaterial to the proper consideration of this case.

III.

Defendant objects to proposed finding of fact No. V in effect reciting that the rate upon said shipment from Roswell, New Mexico, to Yakima, Washington, should not have exceeded Nine Hundred Forty & 66/100 ($940.66) Dollars, including war tax, and on the shipment to Walla Walla, Washington, should not have exceeded Five Hundred Thirty-seven & 92/100 ($537.92) Dollars, including war tax and also finding that plaintiff was overcharged the sum of Three Hundred Seventy-one & 09/100 ($371.09) Dollars on the shipment to Yakima and the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars on the shipment to Walla Walla, Washington, and alleges said finding to be immaterial and not in accordance with the lawful published and established rate on Alfalfa Seed from Roswell, New Mexico to Walla Walla and Yakima, respectively, which said rate is the sum of Two & 44/100 ($2.44) Dollars per cwt. including war tax.

IV.

Defendant objects to finding of fact No. VI and alleges that since the plaintiff has not been overcharged, attorney's fees can not legally be allowed.

47

V.

Defendant objects to conclusions of law proposed by plaintiff, and alleges such conclusions are not properly drawn from the foregoing facts, but requests the Court to find that the proper freight charges upon said shipments respectively, were the sum of Thirteen Hundred Twelve & 04/100 ($1,312.04) Dollars, on the shipment to Yakima, Washington, and the sum of Seventeen Hundred Sixteen and 62/100 ($1,716.62) Dollars on the shipment to Walla Walla, Washington, said sums being the amounts exacted from the plaintiff on account of the movement of said shipments.

VI.

Defendant further objects to the allowance of any interest to the plaintiff, either at six (6%) per cent, or any other rate per annum, from the date said freight charges were paid, even though it may be ultimately decided that plaintiff is entitled to judgment for the principal amounts prayed for.

VII.

Defendant also requests the Court a judgment in his favor and against the plaintiff for his costs and disbursements in this behalf expended. A. C. Spencer, Jno. F. Reilly, C. E. Cochran, Attorneys for Defendant.

[Filed endorsement omitted.]

Overruled June 2, 1921. R. S. Bean, Judge.

48 Service by copy admitted at Portland, Oregon, June 2, 1921. James G. Wilson, Solicitor for Plaintiff.

And afterwards, to wit, on the 20th day of July, 1921, there was duly filed in said Court, a bill of exceptions, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Bill of Exceptions.**

[Filed July 20, 1921.]

Be it remembered, That on the 31st day of May, 1921, at Portland, Oregon, the above-entitled action regularly came on for trial before the Honorable Robert S. Bean, District Judge; plaintiff appearing by James G. Wilson, and defendant appearing by Charles E.

49 Cochran, respectively, the attorneys. A jury having been waived said cause was tried to the Court.

Whereupon, the following proceedings were had:

*Testimony of F. W. Nelson, for Plaintiff.*

F. W. Nelson, called as a witness on behalf of plaintiff after being first duly sworn, testified as follows:

Direct examination.

(By Mr. Wilson:)

My name is F. W. Nelson, residence Portland, business traffic man for Portland Seed Company, plaintiff; am familiar with the records and movements of traffic of that company in December, 1918, and



Minnesota State Library
St. Paul, Minn.

January, 1919, including the two shipments of alfalfa seed consigned by E. W. Mitchell from Roswell, New Mexico; the one to North Yakima under bill of lading dated December 19, 1918, containing, according to the bill of lading 345 bags of alfalfa seed, and the other to Walla Walla under bill of lading dated January 4, 1919, purporting to cover 196 bags of alfalfa seed. These shipments consisted of alfalfa seed; the Portland Seed Company was the owner who paid the freight on both shipments.

Mr. Wilson: Copies of the bills of lading are offered in evidence, which I have agreed with Mr. Cochran are correct copies of the bills of lading.

Same are received and marked Plaintiff's Exhibit- 1 and 2 respectively, and are attached to this bill of exceptions and made a part hereof.

50 Mr. Cochran: I will agree that the documents, which have been marked Plaintiff's Exhibit- 1 and 2 respectively, are copies of the original bills of lading which are in the possession of the defendant here in Portland in its files; also that the bills were endorsed in blank by E. W. Mitchell and were surrendered on payment of the freight; and also were endorsed by the Portland Seed Company.

Mr. Wilson: I would like to ask counsel for the original expense bill which was turned in to the Director General at the time freight claims were filed.

Mr. Cochran: In response to counsel's demand, I produce Form 747, Union Pacific System form, in use by the Director General, being freight bill dated Yakima, Washington, January 8, 1919, E. W. Mitchell, consignee, Portland Seed Company notify party.

Mr. Wilson: I would like to offer the document in evidence.

Same was received, marked Plaintiff's Exhibit 3, and is physically attached to this bill of exceptions and made a part thereof.

Mr. Cochran: Also in response to counsel's demand, I produce form 746, freight bill in use by the United States Railroad Administration, dated January 24, 1919, in which Mr. E. W. Mitchell is consignee, and Portland Seed Company the notify party.

51 Same was received in evidence, marked Plaintiff's Exhibit 4, and is physically attached to this bill of exceptions and made a part hereof.

*Testimony of A. J. Parrington, for Plaintiff.*

A. J. PARRINGTON, called as a witness for plaintiff, being first duly sworn, testified as follows:

Direct examination.

(By Mr. Wilson:)

My name is A. J. Parrington; occupation traffic attorney, have been such for last 12 years; am familiar with the method of comparing and reading tariffs of railroad companies, including expense

bills. Plaintiff's Exhibit 3 which I have in my hand shows on its face that it is a freight bill of the United States Railroad Administration covering a carload shipment of alfalfa seed originally at Roswell, New Mexico; was routed by the Atchison, Topeka & Santa Fe Railroad Lines to Denver, Colo., and Union Pacific System to Yakima, Washington. Plaintiff's Exhibit 4, which I hold in my hand is a paid freight bill of the United States Railroad Administration, covering a carload shipment of alfalfa seed from Roswell, New Mexico, via the Atchison, Topeka & Santa Fe Railroad Lines to Denver, Colo., and Union Pacific System Lines to Walla Walla, Washington.

Q. Have you a map, Mr. Parrington, of the location of the originating point and also the destination points of these shipments?

A. I have a large wall map of the A. T. & S. F. Railway
52 System.

The witness under appropriate interrogations continued:

I have marked on this map the location of Roswell, New Mexico, with the letter "A"; the location of Pecos, Texas, with the letter "B"; the location of Yakima, Washington, with the letter "C," and of Walla Walla, Washington, with the letter "D." The map shows the entire route which the shipments took.

From Roswell, New Mexico, the shipments moved via Clovis; marked upon the map with the figure "1," the next junction point in the movement is Belen, New Mexico, which is marked on the Map with the figure "2"; thence to La Junta, and from La Junta to Denver, at Denver the connection is with the Union Pacific System to point of destination.

Map offered in evidence and received, marked Plaintiff's Exhibit 5, and is physically attached hereto and made a part of this Bill of Exceptions.

The witness continued:

I have a set of tariffs in effect governing the transportation of alfalfa seed from Pecos, Texas, in effect during December, 1918, and January, 1919. There are no through rates from Roswell to Walla Walla and Yakima, Washington, respectively.

Thereupon, by agreement, the witness read into the record the material parts of the railroad tariffs, and continued as follows:

53 This is a tariff of the United States Railroad Administration published by R. H. Countiss, Agent, and carries the I. C. C. No. 1049; the original tariff was dated March 15, 1918, and was continued in effect up to and following the date of the shipment of the two cars mentioned. The tariff is made up in geographical grouping method, and the State of Texas is carried in the list of points from which the rates named herein apply. Texas is shown as taking group H rates. Walla Walla is shown in the list of stations in Washington as taking rate basis 3, Commodity Rates, shown on page 84; Yakima is shown on page 87 as taking Rate Basis 2 Rates; item twenty-one sixty on page 246 of this tariff names rate on alfalfa seed in bags from group H to Rate Basis 2 and Rate Basis 3 of $1.21 per cwt.; that rate was increased by 25% under the authority of Director

General of Railroads, United States Railroad Administration, General Order No. 28, making a rate from Pecos, Texas, to Walla Walla and Yakima, Washington, of $1.51½.

I have now given all of the tariff references providing for the rate on alfalfa seed, carload lots from Pecos, Texas, to Yakima and Walla Walla, Washington.

Pecos, Texas, is located on the Panhandle & Santa Fe Branch of the Atchison, Topeka & Santa Fe Railroad Company's lines and is located directly south of Roswell, New Mexico; both are on the same route to Walla Walla and Yakima, Washington. Pecos,
54 Texas, is the more distant point, and Roswell, New Mexico, is intermediate between Pecos, Texas and WallaWalla and Yakima, Washington, on the line over which the shipments moved.

There is no way by which the shipments from Pecos, Tex., via the line of the A. T. & S. F. to Denver, and Union Pacific to Walla Walla and Yakima could move except through Roswell, New Mexico. The rate from Pecos, Texas, to Walla Walla and Yakima is $1.51½ per cwt. in carload lots. I have figured the freight using this rate on Plaintiff's Exhibit 3; the total charges would aggregate $913.25 freight charges and $27.41 war tax, a total of $940.66. The proper freight charges on plaintiff's Exhibit 4 would aggregate $522.25, war tax $15.67, making a total of $537.92. There is nothing contained in item 2160 on page 246 of the R. H. Countiss tariff, I. C. C. No. 1049, nor on the title page of said tariff which would indicate in any way that permission has been given by the I. C. C. to charge less for the longer haul from Pecos, Texas, to Walla Walla and Yakima, Washington, than from Roswell, New Mexico, to Walla Walla or Yakima, Washington.

Mr. Wilson: The reason I am offering is that there is a ruling of the Interstate Commerce Commission in regard to the formation of tariff that in case any permission of that kind is given it shall be noted on the title page, and we find no such notation, and I am offering that in support of my allegation that no permission has been applied for and none granted. In that connection I would
55 like to read into the record a part of Rule 77 of Tariff Circular 18-A issued by the Interstate Commerce Commission, which relates to the notation upon the title page of Tariff when any such permission is given, and same follows:

"When the commission has issued an order granting to a carrier permission to depart from the provisions of the amended fourth section of the Act, and to charge higher rates or fares for shorter than for longer distances over the same line or route, the title page of each tariff issued and filed under such authority must bear the following notation: 'This tariff contains rates (fares) that are higher for shorter distance than for longer distances over the same route, such departure from the terms of the amended fourth section of the Act to regulate commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. —— of (date) of 19—.' When the Commission has issued an order granting to a carrier authority to depart from the provisions of the amended fourth section of the Act and to charge rates or fares higher than the aggregate of inter-

mediate rate or fares subject to the Act, the title page of each tariff issue and file under such authority must bear the following notation: "This tariff contains rates (or fares) that exceed the sums of the intermediate rates (or fares) subject to the Act. Such departure from
the terms of the amended fourth section of the Act to Regu-
56 late Commerce is permitted by authority of Interstate Commerce Commission Order F. S. No. — of (date) 19—. Nothing in this rule may be construed as waiving any of the provisions of amended fourth section of the Act to regulate Commerce."

Cross-examination.

(By Mr. Cochran:)

The witness testified as follows:

The rate in effect at the time the shipments moved from Roswell, New Mexico, to Walla Walla and Yakima, Washington, respectively, via the A. T. & S. Fe to Denver and Union Pacific System to Walla Walla and Yakima was $2.44 per hundred pounds carload lots on alfalfa seed in bags. Roswell, New Mexico, was not named in the groups from which through rates applied to New Mexico, so a combination of rates from Roswell to Denver and from Denver to Walla Walla and Yakima, Washington, in the sum of $2.44 per hundred pounds was the rate actually charged. The rate from Pecos, Texas, to Walla Walla and Yakima respectively, was $1.51½ per hundred pounds.

*Testimony of James G. Wilson, for Plaintiff.*

Mr. JAMES G. WILSON, a witness on behalf of plaintiff, being first duly sworn, testified as follows:

It was admitted that Mr. Wilson was an attorney and has
57 experience about the matters concerning which he proposed to testify.

Thereupon Mr. Wilson stated that he had been an attorney for the Portland Seed Company during the negotiations in respect to securing a refund on the two rates testified to by Mr. Parrington; that he had prepared all papers in the case, written a number of letters with reference to securing a refund from the Director General without the necessity of suit. Negotiations came to naught and he was compelled to file suit. In preparing the case for trial argued a demurrer; the argument consumed two days, and in preparation for argument a period of a week or ten days was necessary, and that he considers $75.00 a reasonable attorney's fee in one cause of action, and $100.00 to be such reasonable attorney's fee in the other.

Plaintiff rests.

The defendant offered no testimony.

Mr. Cochran: At this time we desire to request findings for the defendant, on the ground and for the reasons set forth in the demurrer to the complaint, which was argued at length before your Honor, among which may be mentioned that the complaint does not state

facts sufficient to constitute a cause of action, and, second, that the court is without jurisdiction of the subject matter of the action, and, third, that the facts as presented created a case wholly within the jurisdiction of the Interstate Commerce Commission, fourth, that the facts in evidence do not disclose a violation of the
58–61 fourth section of the Interstate Commerce Act, and the tariff was assessed from the points from and to which the shipments actually moved; that the charges in these tariffs were properly applied, and the amounts which were finally corrected, after the refunds were made, were in accordance with the tariffs that were actually applied and filed, and the plaintiff has not been damaged by any act of the defendant; and, as a conclusion from these facts, we think a judgment—and so request—should be in favor of the defendant.

The Court. In view of the ruling of the Court on the demurrer to the complaint, it seems to me there is only one conclusion it can arrive at in this case at this time. That is judgment in favor of the plaintiff for the difference between the long and short haul, and the Court will find $175.00 as reasonable attorney's fees.

Mr. Cochran: To the ruling of the Court in finding generally on the facts in favor of the plaintiff, we desire to note an exception, which exception was duly allowed.

Thereupon Mr. Wilson as counsel for plaintiff, submitted to the Court a request for findings and judgment in favor of the plaintiff in the manner following:

[Omitted; printed p. 38.]

62 Thereupon the defendant by its attorney, submitted in writing to the court the following objections in the Findings
63 of Fact and Conclusions of Law:

Defendant, by Charles E. Cochran, one of his attorneys, objects to the findings of Fact and Conclusions of Law requested by the plaintiff, that is to say:

I.

Defendant objects to proposed finding of fact No. III in respect to the rate on the shipments referred to in paragraphs I and II of the proposed finding of fact from Pecos, Texas, to Walla Walla and Yakima, Washington, respectively, of One & 51½/100 ($1.51½) Dollars per cwt. alleging said findings to be immaterial to the proper issues in this case.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

II.

Defendant objects to proposed finding of fact No. IV in effect reciting that Pecos, Texas, is a point more distant from Walla Walla and Yakima, respectively over the route on which shipments moved than Roswell, New Mexico, alleging said finding to be immaterial to the proper consideration of this case.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

III.

64 Defendant objects to proposed finding of fact No. V in effect reciting that the rate upon said shipment from Roswell, New Mexico, to Yakima, Washington, should not have exceeded Nine Hundred Forty & 66/100 ($940.66) Dollars, including war tax, and on the shipment to Walla Walla, Washington, should not have exceeded Five Hundred Thirty-seven & 92/100 ($537.92) Dollars, including war tax, and also finding that plaintiff was overcharged the sum of Three Hundred Seventy-one & 09/100 ($371.09) Dollars on the shipment to Yakima, and the sum of One Hundred Seventy-seven & 87/100 ($177.87) Dollars on the shipment to Walla Walla, Washington, and alleges said finding to be immaterial and not in accordance with the lawful published and established rate on alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, respectively, which said rate is the sum of Two & 44/100 ($2.44) Dollars per cwt. including war tax.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

IV.

Defendant objects to finding of fact No. VI and alleges that since the plaintiff has not been overcharged, attorney's fees can not legally be allowed.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exception was duly allowed.

V.

Defendant objects to conclusions of law proposed by plaintiff, and alleges such conclusions are not properly drawn from the fore-
65 going facts, but requests the Court to find that the proper freight charges upon said shipments respectively, were the sum of Thirteen Hundred Twelve & 04/100 ($1,312.04) Dollars, on the shipment to Yakima, Washington, and the sum of Seventeen Hundred Sixteen & 62/100 ($1,716.62) Dollars on the shipment to Walla Walla, Washington, said sums being the amounts exacted from the plaintiff on account of the movement of said shipments.

The Court overruled said objection, to which ruling of the Court counsel excepted and his exceptions was duly allowed.

VI.

Defendant further objects to the allowance of any interest to the plaintiff, either at six (6%) per cent or any other rate per annum, from the date said freight charges were paid, even though it may

**ORDER BILL OF LADING—ORIGINAL.**

Shipper's No.

Agent's No.

RECEIVED subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at Roswell N M Dec 19th 1918

from E W Mitchell the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road or otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained (including conditions on back hereof) which are agreed to by the shipper and accepted for himself and his assigns.

**The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.**

The Rate of Freight from

to

is in cents per 100 lbs.

| If Three-Ist | If Second Class | If Third Class | If 4th Class | If 5th Class | If A Class | If B Class | If C Class | If D Class | If E Class |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | |

(UNITED STATES RAILROAD ADMINISTRATION)

(Mail Address—Not for purposes of delivery)

Consigned to ORDER OF E W Mitchell

Destination North Yakima State of Wash County of COPY

Notify Portland Seed Co

At North Yakima State of Wash County of

Route Car Initial MKT Car No. 87309

| No. of Pkgs. | Description of Articles and Special Marks | Weight (Subject to Correction) | Class or Rate | Check Column |
|---|---|---|---|---|
| 345 | Bags alfalfa Seed | 60581 | | |
| | COPY | | | |
| | above loaded in 16 oz | | | |
| | Seamless Cotton Bags | | | |

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Collect

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Roswell N M., April 7th. 1919. COPY

~~I hereby certify that above is a true and~~ correct copy of original bill of lading.

E W Mitchell

COPY

Charges Advanced:

$ 19892

Exhibit Plaintiffs'

E W Mitchell Shipper. B L Rose Agent.

Per Per

(THIS BILL OF LADING IS TO BE SIGNED BY THE SHIPPER AND AGENT OF THE CARRIER ISSUING SAME.)

69

# ENDORSEMENTS.

E. W. Mitchell

Morgan McKay & Co
By F. A. Morgan

Portland Seed Co
per D. Jansen
Credit Manager

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUN 1 1921
CLERK

## UNIFORM BILL OF LADING.

Order Bill of Lading. Conditions

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay [illegible] the cause of God the public enemy compromise the authority of consigning the same for greater compensation on handling or for any use and shall not be held responsible for deviation or unavoidable delay in procuring such conveyance. Grain in bulk consigned to a point where there is a railroad public or [illegible] may [illegible] where such use is expressly noted herein, and then only pro rata per [illegible] these date and reduced [illegible]

ard... Standard form of Order Bill of Lading approved by Interstate Commerce Commission by Order No. 787, ... is to conform with the requirements of the Cummins-Amendment to the Act to Regulate Commerce, effective June 2, 1915.

# The Atchison, Topeka & Santa Fe Railway Company.

Shipper's No.

## ORDER BILL OF LADING—ORIGINAL.

Agent's No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at Roswell N M Jan 4th 191 C

from E W Mitchell the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) which are agreed to by the shipper and accepted for himself and his assigns.

**The surrender of this Original ORDER Bill of Lading properly endorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is endorsed on this original bill of lading or given in writing by the shipper.**

**The Rate of Freight from**

**to** **is in cents per 100 lbs.**

| If Prepaid | If Collect |
|---|---|
| | |

| If Commodities 1st Class | If 1st Class | If 2d Class | If 3d Class | If 4th Class | If 5th Class | If A Class | If B Class | If C Class | If D Class | If E Class |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |

(Mail address Not for ...)

COPY

Consigned to ORDER OF E W Mitchell

Destination Walla Walla State of Wash County of

Notify Portland Seed Co

ENDORSEMENTS.

E W Mitchell
Morgan Mc Kay & Co.
Morgan Mc Kay & Co.
Roswell N.M.
Pay to the order of
The Alfalfa Seed Co
Roswell N.M.
Pay to the order of
Credit Manager

U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED
JUN 1 1921
CLERK

# UNIFORM BILL OF LADING.

At Walla Walla Alfalfa Seed Co State of Wash County of

Route Car Initial MKT Car No. 93666

COPY

| No. Packages | DESCRIPTION OF ARTICLES AND SPECIAL MARKS | WEIGHT Subject to Correction | CLASS OR RATE | CHECK COLUMN |
|---|---|---|---|---|
| 196 | Bags Alf Seed | 34538 | | |
| | Loaded in 16 oz Seamless Cotton Bags | | | |

If charges are to be prepaid, write or stamp here "To be Prepaid"

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

COPY

Roswell N.M., April 7th.,1919.

I hereby certify that above is a true and correct copy of original bill of lading.

E W Mitchell

Charges Advanced

Ewmitchell Shipper. B.F.Rose Agent.

Per _____ Per _____

(THIS BILL OF LADING IS TO BE SIGNED BY THE SHIPPER AND AGENT OF THE CARRIER ISSUING SAME.)

Plaintiffs Exhibit 9 70

**Service.**

[Filed July 20, 1921.]

Due and legal service of the within Bill of Exceptions, prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 14th day of July, 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

(Here follow bills of lading, marked pages 68-70, inc.)

71 In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Stipulation re Exhibits Nos. 3 and 4 to Bill of Exceptions.**

[Filed Jan. 19, 1922.]

Whereas, Plaintiff's Exhibits Nos. 3 and 4 are, respectively, freight bills of the United States Railroad Administration covering the carloads of alfalfa seed originating at Roswell, New Mexico, and routed via the Atchison, Topeka & Santa Fe lines to Denver, Colorado, and via Union Pacific System to Yakima, and Walla Walla, Washington; and

Whereas, the only purpose of such exhibits is to show what the freight was, the amount collected, and the route the shipment moved; and

Whereas, there is no dispute in respect thereto, nor is there any point made thereon in the Circuit Court of Appeals involving a dispute of the facts shown by such exhibits.

Now, therefore, it is stipulated and agreed between counsel for the parties hereto that the Clerk of the Lower Court in certifying the transcript to the Circuit Court of Appeals may omit said
72 Exhibits Nos. 3 and 4, and send this stipulation in lieu thereof, and that the recitals of this stipulation may have the same force and effect as said original Exhibits Nos. 3 and 4. James G. Wilson, Attorney for Plaintiff. C. E. Cochran, Attorney for Defendant.

[File endorsement omitted.]

And afterwards, to wit, on the 4th day of August, 1921, there was duly filed in said Court, a stipulation for trial before the court without intervention of a jury, in the words and figures as follows, to wit:

S. DISTRICT COURT
DISTRICT OF OREGON
F I L E D
JUN 1 1921
CLERK

## UNIFORM BILL OF LADING.

Order Bill of Lading—Conditions.

Section 1. The carrier or party in possession of any of the property described herein shall be liable for any loss thereof or damage thereto except as herein otherwise provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law or the act or default of the shipper or owner or for differences in

of compressing the same for greater safety or security in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in preserving such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded by the consignee) be delivered to such elevator, subject to the conditions of the governing tariffs, and the elevator charges on the same shall be a lien on the grain and the proceeds thereof in the hands of any party, and the carrier shall have no further responsibility for the grain after the delivery thereof as provided for in this section, and if no elevator is named herein, or if delivery cannot be made at the elevator named herein, delivery may be made at any regularly licensed elevator, or warehouse, at the option of the carrier, and the same shall be subject to a

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**Service.**

[Filed July 20, 1921.]

Due and legal service of the within Bill of Exceptions, prepared and certified to be such by Charles E. Cochran, one of the attorneys for the defendant, is hereby admitted at Portland, Oregon, this 14th day of July, 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

(Here follow bills of lading, marked pages 68-70, inc.)

71 In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Stipulation re Exhibits Nos. 3 and 4 to Bill of Exceptions.**

[Filed Jan. 19, 1922.]

Whereas, Plaintiff's Exhibits Nos. 3 and 4 are, respectively, freight bills of the United States Railroad Administration covering the carloads of alfalfa seed originating at Roswell, New Mexico, and routed via the Atchison, Topeka & Santa Fe lines to Denver, Colorado, and via Union Pacific System to Yakima, and Walla Walla, Washington; and

Whereas, the only purpose of such exhibits is to show what the freight was, the amount collected, and the route the shipment moved; and

Whereas, there is no dispute in respect thereto, nor is there any point made thereon in the Circuit Court of Appeals involving a dispute of the facts shown by such exhibits.

Now, therefore, it is stipulated and agreed between counsel for the parties hereto that the Clerk of the Lower Court in certifying the transcript to the Circuit Court of Appeals may omit said

72 Exhibits Nos. 3 and 4, and send this stipulation in lieu thereof, and that the recitals of this stipulation may have the same force and effect as said original Exhibits Nos. 3 and 4. James G. Wilson, Attorney for Plaintiff. C. E. Cochran, Attorney for Defendant.

[File endorsement omitted.]

And afterwards, to wit, on the 4th day of August, 1921, there was duly filed in said Court, a stipulation for trial before the court without intervention of a jury, in the words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Stipulation for Trial Before Court Without a Jury.**

[Filed Aug. 4, 1921.]

It is stipulated between plaintiff and defendant by and through their respective counsel, that a jury in the trial of the above-
73 entitled action be and the same is hereby waived, and the parties consent to try the action to the court.

Dated at Portland, Oregon, May 31, 1921. Geo. B. Guthrie, Of Attorneys for Plaintiff. C. E. Cochran, Of Attorneys for Defendant.

[File endorsement omitted.]

And afterwards, to wit, on Thursday, the 4th day of August, 1921, the same being the 28th judicial day of the regular July term of said court—Present: The Honorable Charles E. Wolverton, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Order to Try Cause Before the Court Without a Jury.**

[Filed August 4, 1921.]

Now at this time motion having been made in open court
74 by C. E. Cochran, of counsel for the defendant, that the oral stipulation heretofore entered into on May 31, 1921, waiving trial by jury, be substituted by a written stipulation, and Mr. James G. Wilson, of counsel for plaintiff, being present and concurring therein,

And it appearing to the Court that the written stipulation now offered should be substituted for the oral stipulation heretofore entered into,

It is ordered that the written stipulation waiving trial by jury be accepted by the clerk of this Court and filed August 4, 1921, but to be in effect as of May 31, 1921. Chas. E. Wolverton, Judge.

[File endorsement omitted.]

And afterwards, to wit, on the 29th day of September, 1921, there was duly filed in said Court, a petition for writ of error, in words and figures as follows, to wit:

75 In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Petition for Writ of Error.**

[Filed Sept. 29, 1921.]

James C. Davis, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), defendant in the above-entitled cause, considering himself aggrieved by the final order and judgment of this Court made and entered against him and in favor of the plaintiff on the first day of June, 1921, and in rulings and instructions in said action made as set forth in its assignments of error filed herein, petitions said Court for an order allowing said defendant to procure a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignments of error filed herewith under and in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit in that behalf made and provided:

And also that an order be made fixing the amount of se-
76 curity which the defendant shall give and furnish upon said writ of error, and that upon giving such security all further proceedings in this Court be suspended and stayed until the dismissal of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and relative thereto defendant respectfully shows:

That by reason of the premises defendant alleges manifest error has happened to the great damage of the defendant herein.

The defendant has filed herewith his assignments of error upon which he relies and will urge in the said Circuit Court of Appeals.

Wherefore defendant prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this Court for the correction of errors so complained of, and that a transcript of the record of proceedings, papers and all things concerning same upon which said judgment was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit to the end that said judgment be reversed and that defendant recover judgment as demanded in his answer. Arthur C. Spencer, John F. Reilly, Charles E. Cochran, Attorneys for Defendant.

Service by copy admitted at Portland, Oregon, this 29th day of September, A. D. 1921. James G. Wilson, Attorney for Plaintiff.

77 [File endorsement omitted.]

And afterwards, to wit, on the 29th day of September, 1921, there was duly filed in said Court, an assignment of errors, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

## Assignments of Error.

[Filed Sept. 29, 1921.]

Comes now the defendant above named, James C. Davis, Agent United States Railroad Administration, appearing by Arthur C. Spencer, John F. Reilly and Charles E. Cochran, his attorneys of record, and says that the judgment and final order of this Court made and entered in the above-entitled Court on the first day of June, 1921, in favor of the plaintiff above named and against the defendant above name is erroneous and against the just rights of the defendant, and files herein together with his petition for
78 writ of error from said judgment and order, the following assignments of error which he avers occurred upon the trial of the said cause:

I.

The Court erred in overruling and in not sustaining defendant's demurrer to the plaintiff's complaint, which said demurrer alleged that the Court had no jurisdiction of the subject of the action.

II.

The Court erred in denying the defendant's request for findings in his favor, which request was based upon the reasons, among others, that the complaint does not state facts sufficient to constitute a cause of action, that the Court is without jurisdiction of the subject matter of the action, and that the facts as presented create a case wholly within the jurisdiction of the Interstate Commerce Commission, that the facts in evidence do not disclose a violation of the fourth section of the Interstate Commerce Act, and that the tariff was properly assessed and applied, and that the plaintiff had not been damaged by any act of the defendant.

III.

The Court erred in finding in favor of the plaintiff on the evidence submitted, and in sustaining plaintiff's request for findings and judgment in its favor.

IV.

The Court erred in respect to finding of fact No. III over the objection of defendant that there was established and in effect
79 over the lines which the shipments described in the complaint moved from Pecos, Texas, to Walla Walla and Yakima, Washington, respectively, a rate of $1.51½ per cwt.

V.

The Court erred in finding that Pecos, Texas, is a point more distant from Walla Walla and Yakima, Washington, over the route of which said shipments moved than Roswell, New Mexico, and that the defendant secured no permission from the Interstate Commerce Commission to charge higher rates for transportation of alfalfa seed from Roswell, New Mexico, to Walla Walla and Yakima, Washington, than from Pecos, Texas, over said route.

VI.

The Court erred in its finding of fact No. 5 in reciting that the rate upon said shipments from Roswell, New Mexico, to Yakima, Washington, would not have exceeded $940.66, including war tax, and that the shipment to Walla Walla, Washington, should not have exceeded $537.92, including war tax, and also finding that plaintiff was overcharged the sum of $371.09 on the shipment to Yakima, and the sum of $177.87 on the shipment to Walla Walla, Wash.

VII.

The Court erred in allowing the plaintiff the sum of $175.00 as attorney's fees which the Court taxed as a part of the costs herein.

VIII.

The Court erred in concluding as a matter of law that
80 the plaintiff was entitled to a judgment against the defendant in the sums of $307.09 overcharges on the shipment to Yakima, Washington, and $177.87 overcharges on the shipment to Walla Walla, Washington, and the further sum of $175.00 as attorney's fees taxed as a part of the costs of said action.

IX.

The Court erred in entering judgment in favor of the plaintiff and against the defendant for the foregoing amounts mentioned in the eighth assignment of error.

Wherefore the said defendant and plaintiff in error prays that said judgment of the District Court be reversed with directions to the District Court to enter a judgment in favor of the defendant. Arthur C. Spencer, John F. Reilly, Charles E. Cochran.

Service by copy admitted at Portland, Oregon, this 29th day of September, 1921. James G. Wilson, Attorney for Defendant.

[File endorsement omitted.]

81 And afterwards, to wit, on Friday, the 30th day of September, 1921, the same being the seventy-seventh judicial day

of the regular July term of said Court—Present: the Honorable Robert S. Bean, United States District Judge, presiding—the following proceedings were had in said cause, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Order Allowing Writ of Error.**

[Filed Sept. 30, 1921.]

On this 30th day of September, 1921, came the defendant above named, James C. Davis, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines), appearing by Arthur C. Spencer, John F. Reilly and Charles E. Cochran, his attorneys of record, and filed herein and presented to the Court his petition praying for the allowance of a writ of error from the decision and judgment of this Court, made and entered on the first day of June, 1921, in favor of the plaintiff above named and against
82 said defendant from the rulings and instructions made on trial of the above-entitled cause out of the United States Circuit Court of Appeals in and for the Ninth Circuit to this Court, together with certain assignments of error intended to be urged by him within due time:

And also praying that a transcript of the record and proceedings and papers upon which said judgment herein was entered, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit, and also praying that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now therefore, in consideration thereof this Court does allow said writ of error upon said defendant filing with the Clerk of this Court a good and sufficient bond in the sum of Two Thousand and 00/100 ($2,000.00) dollars, to the effect that if said defendant, James C. Davis, Agent, United States Railroad Administration, shall prosecute the said writ of error to effect and answer all damages and costs if defendant fails to make his plea good, then said bond to be void,
83 otherwise to remain in full force and virtue, the said bond to be approved by the Court and

It is ordered that all proceedings in this Court be and the same are hereby suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and that said bond shall operate as a supersedeas bond.

Dated this 30th day of September, 1921. R. S. Bean, Judge.

[File endorsement omitted.]

And afterwards, to wit, on the 30th day of September, 1921, there was duly filed in said Court, a bond on writ of error, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

84 **Bond on Writ of Error.**

[Filed Sept. 30, 1921.]

Know all men by these presents that James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Lines), principal, and National Surety Company of New York, a corporation, surety, are held and firmly bound unto the Portland Seed Company, the plaintiff above-named, in the sum of Two Thousand and 00/100 ($2,000.00) Dollars, to be paid to the said The Portland Seed Company, to which payment well and truly to be made we bind ourselves and each of us severally and jointly and each of our successors and assigns firmly by these presents sealed with our seals and dated this 30th day of September, 1921.

Whereas, the above-named James C. Davis, Agent, United States Railroad Administration, (Oregon-Washington Railroad & Navigation Lines), is prosecuting a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled cause by the District Court of the United States for the District of Oregon, entered on the first day of June, 1921.

Now the condition of this obligation is such that if the above-named James C. Davis as agent, defendant, shall prosecute said writ of error to effect and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void,
85 otherwise to be and remain in full force and effect. James C. Davis, Agent United States Railroad Administration, by C. E. Cochran, One of His Attorneys. The National Surety Company of New York, by E. P. Welch, Resident Vice-President. [Seal of the National Surety Co. of New York.] Attest: D. E. Gorton, Resident Asst. Secy.

Countersigned at Portland, Oregon, this 30th day of September, 1921. E. P. Welch, Resident Agent.

Examined and approved this 30th day of September, 1921. R. S. Bean, District Judge.

Service by copy admitted at Portland, Oregon, this 29th day of September, 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

86 And afterwards, to wit, on the 31st day of December, 1921, there was duly filed in said Court, a stipulation as to exhibits, in words and figures, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Stipulation re Exhibits.**

[Filed Dec. 31, 1921.]

It is stipulated between counsel for plaintiff and defendant that the original exhibits, namely, Plaintiff's Exhibits Nos. 1, 2, 3, and 4, may be detached from the original bill of exceptions and attached to the copy thereof which the Clerk of the District Court will prepare and certify for the purpose of docketing this cause in the United States Circuit Court of Appeals for the Ninth Circuit. Wilson & Guthrie, Attorney for Plaintiff. C. E. Cochran, of Attorneys for Defendant.

87 [File endorsement omitted.]

And afterwards, to wit, on the 31st day of December, 1921, there was duly filed in said Court, a præcipe for transcript, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Præcipe for Transcript of Record.**

[Filed Dec. 31, 1921.]

To the clerk of the above-entitled court:

You will please prepare transcript of the complete record in the above-entitled case to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the ninth circuit, under the writ of error perfected herein and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

88 1. The Complaint.
2. Demurrer to Complaint.
3. Order overruling demurrer.
4. Order substituting James C. Davis, as Agent United States Railroad Administration, in lieu of John Barton Payne.
5. Answer.
6. Reply.
7. Bill of exceptions and certificate attaching original exhibits to the transcript pursuant to stipulation of counsel.
8. Judgment.
9. Petition for writ of error.
10. Assignments of error.
11. Order allowing writ of error and fixing bond.
12. Supersedeas bond and bond for costs.

13. Writ of error.
14. Citation on writ of error.
15. This præcipe and any and all records, entries, pleadings, papers and files necessary or proper to make a complete record from said writ of error in said cause, said transcript to be prepared as required by law and the rules of this court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

A. C. Spencer, J. F. Reilly, C. E. Cochran, Attorneys for Defendant.

89 Service by copy admitted at Portland, Oregon, this 31st day of December, A. D. 1921. James G. Wilson, Attorney for Plaintiff.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
*District of Oregon, ss:*

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, G. H. Marsh, Clerk of the United States District Court of the District of Oregon, pursuant to the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from three to eighty-eight, inclusive, constitute the transcript of record upon writ of error in the case in said court in which the Portland Seed Company, a corporation, is plaintiff and defendant in error, and James C. Davis, Agent, United States Railroad Administration (Oregon-Washington Railroad & Navigation Lines) is defendant and plaintiff in error; that the foregoing pages contain a true and complete transcript of the record and proceedings had in said court in said cause in accordance with the præcipe for transcript filed in said cause by said plaintiff in error, as the same appears of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript
90 is $22.75, and that the same has been paid by the said plaintiff in error.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 23d day of January, 1922. G. H. Marsh, Clerk. [Seal.]

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Order Extending Time to and Including December 31, 1921, to File Record and Docket Cause.**

[Filed Jan. 25, 1922.]

Now at this day, for good cause shown it is ordered that the time for filing the transcript of record in the above-entitled cause and

docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to December 31, 1921. Chas. E. Wolverton, Judge.

91 [File endorsement omitted.]

In the District Court of the United States for the District of Oregon.

[Title omitted.]

**Order Extending Time to and Including January 20, 1922, to File Record and Docket Cause.**

[Filed Jan. 3, 1922.]

On this date, for good cause shown, it is ordered that the time for filing the transcript of record in the above-entitled cause and docketing same in the United States Court of Appeals, for the Ninth Circuit, be and the same is hereby extended to January 20th, 1922. R. S. Bean, Judge.

[File endorsement omitted.]

92 In the Dnstrict Court of the United States for the District of Oregon.

L–8723.

January 18, 1922.

[Title omitted.]

**Order Extending Time to and Including January 28, 1922, to File Record and Docket Cause.**

[Filed Jan. 25, 1922.]

Now at this day for good cause shown, it is ordered that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and inclusive of January 28, 1922. R. S. Bean, Judge.

[Endorsement omitted.]

93 United States Circuit Court of Appeals for the Ninth Circuit.

No. 3828.

[Title omitted.]

Upon Writ of Error to the United States District Court of the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

94 *Index to Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*


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95 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. L-8723.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation, Defendant in Error.

**Stipulation for Consolidation of Causes for Trial.**

[Filed Jan. 11, 1922.]

96 It is stipulated and agreed between counsel for the respective parties to the above causes of action now pending in the United States Circuit Court of Appeals for the Ninth Circuit that the Court may make an order to the following effect:

First. That the above-entitled three causes of action may be consolidated for trial in the above-entitled Court, and that briefs of counsel in respect to each of said cases may be accordingly consolidated and the three cases heard together.

Second. That the transcript of record in the case of James C. Davis, Director General, plaintiff in error, vs. The Portland Seed Company, defendant in error, docketed and filed in this Court, be not printed, but said case may be heard and disposed of according to law without such printing and upon the questions presented by the transcripts of record in cases 3799 and 3800, and the parties shall have the right in their brief to state the facts in connection with case No. L-8723, James C. Davis, Agent, Plaintiff in error, vs. The Portland Seed Company, defendant in error, and the decision of said case shall not follow the order in the other two cases above-mentioned in the event that the latter two cases shall be decided on some point other than that involved in said case No. L-8723.

Dated at Portland, Oregon, this 9th day of January, 1922. C. E. Cochran, Of Counsel for Plaintiffs in Error. James G. Wilson, Counsel for Defendant in Error.

97 Dated: San Francisco, California, January 11, 1922.
So Ordered: W. H. Hunt, United States Circuit Judge.

[File endorsement omitted.]

At a stated term, to wit, the October term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Thursday, the ninth day of February, in the year of our Lord one thousand, nine hundred and twenty-two.

Present: Honorable Erskine M. Ross, Circuit Judge, Presiding; Honorable William W. Morrow, Circuit Judge; Honorable William H. Hunt, Circuit Judge.

No. 3799.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

98 No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent United States Railroad Administration, Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, a Corporation, Defendant in Error.

**Order of Submission.**

Ordered leave granted Mr. Ben C. Dey, to appear as amicus curiæ;

Further ordered above-entitled cause argued by Mr. Charles E. Cochran, counsel for the plaintiff in error in each of the above-entitled causes, and by Mr. Ben C. Dey, as amicus curiæ, and by Mr. James G. Wilson, counsel for the defendant in error in each

of the above-entitled causes, and submitted to the court for consideration and decision, with leave to Mr. Dey to file a brief as amicus curiae within fifteen (15) days from date, and with leave to counsel for the defendant in error to reply thereto ten (10) days thereafter.

99 **Order Filing Opinion, etc.**

At a stated term, to wit, the October Term, A. D. 1921, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the fifth day of June, in the year of our Lord one thousand nine hundred and twenty-two.

Present: Honorable William W. Morrow, Circuit Judge, presiding; Honorable William H. Hunt, Circuit Judge.

In the Matter of the Filing of Certain Opinions and of the Filing and Recording of Certain Judgments and Decrees.

By direction of the Honorable Erskine M. Ross, William W. Morrow, and William H. Hunt, Circuit Judges, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this Court in each of the following-entitled causes be forthwith filed by the Clerk, and that a judgment or decree be filed and recorded in the minutes of this Court in each of the said causes in accordance with the opinion filed therein: * * * No. 3799. James C. Davis, etc., Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3800. The San Francisco and Portland Steamship Company, a Corporation, Plaintiff in Error, vs. A. J. Parrington, Defendant in Error. No. 3828. James C. Davis,
100 etc., Plaintiff in Error, vs. The Portland Seed Company, a Corporation, Defendant in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3799.

JAMES C. DAVIS, Agent, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3800.

THE SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, Plaintiff in Error,

vs.

A. J. PARRINGTON, Defendant in Error.

No. 3828.

JAMES C. DAVIS, Agent, Plaintiff in Error,

vs.

THE PORTLAND SEED COMPANY, Defendant in Error.

**Opinion U. S. Circuit Court of Appeals.**

[Filed June 5, 1922.]

Upon Writs of Error to the District Court of the United States for the District of Oregon.

101 Before Ross, Morrow, and Hunt, Circuit Judges.

On Writs of Error to Review Judgments in Favor of Shippers for Recovery of Excess Charges by Carriers.

Parrington's Cases.

HUNT, *Circuit Judge:* These cases involve rates on sugar from San Francisco, California, to Portland, Oregon. The San Francisco and Portland Steamship Company, called the Steamship Company, operates a line of steamers between San Francisco and Portland, via Pacific Ocean, Columbia and Willamette Rivers, with a regular landing place at Ainsworth dock in Portland where connection is had with the Oregon-Washington Railroad & Navigation Company, called the Railroad Company, extending from Portland to North Portland. From December 28, 1917, to February 29, 1920, the Director General exercised control of the steamships. On February 17, 1916, the Steamship Company, in connection with the Railroad Company, put into effect a tariff on sugar in carload lots of a mini-

mum of 30,000 pounds of 12½¢ per cwt. The rate was applicable via the line of the Steamship Company to Portland, thence via the Railroad Company to North Portland, and was in effect until June 25, 1918. On June 25, 1918, the rate to North Portland was raised to 15½¢ per cwt., and continued in effect until August 26, 1920. From August 26, 1920, the rate from San Francisco to North Portland was 19½¢ per cwt. During the several periods men-
102 tioned the rate as per the Steamship Company's tariff from San Francisco to Portland and Astoria, from December 28, 1917, to June 25, 1918, was 15¢ per cwt.; from June 25, 1918, to February 29, 1920, 19¢ per cwt.

Thus the situation became one where before June 24, 1918, the local rate from San Francisco to Portland was higher than the joint rate to North Portland, and after June 24, 1918, the local rate from San Francisco was higher to Portland than the joint rate to North Portland. Astoria carried the same rate as Portland.

The contention of Parrington is that the route from San Francisco to Portland is shorter than the route from San Francisco to North Portland, and that the route from San Francisco to Astoria is shorter than the route from San Francisco to North Portland. The Railroad Company admits the latter claim, but does not concede that the distance from San Francisco to Portland is shorter than from San Francisco to North Portland.

## The Seed Company Case.

The Seed Company claims that during December, 1918, and January, 1919, at Roswell, New Mexico, one Mitchell delivered to the Director General of Railroads two carloads of alfalfa seed consigned to the shipper's order, one car for Yakima, Washington, the other to Walla Walla, Washington, moving over the lines of the Atchison, Topeka & Santa Fe Railway to Denver, thence via Union Pacific lines to Granger, Wyoming, thence via Oregon Short Line to Hunt-
ington, Oregon, thence by Oregon-Washington Railroad and
103 Navigation Lines to Yakima and Walla Walla, Washington. The Director General delivered the cars to the Portland Seed Company upon surrender of the bill of lading endorsed, and thereafter demanded $1,311.75 for the car going to Yakima, and $715.79 for the car moving to Walla Walla.

The published rate on alfalfa seed in carload lots from Roswell, New Mexico, to Yakima and Walla Walla, Washington, was $2.44 per cwt., that rate being a combination of local rates based upon Denver. The through rate from Pecos, Texas, to Yakima and Walla Walla was $1.51½ per cwt. The excess of the Roswell rate over the Pecos rate would produce, for the respective cars, certain sums which, with fees and costs, the Seed Company sued for.

The contention is that Pecos, Texas, being a point more distant from Roswell, New Mexico, on the same line or route over which shipments moved, any sum collected in excess of the Pecos rate was in violation of section 4, the long and short haul clause of the Interstate Commerce Act.

In Parrington's cases it is argued that the Steamship Company could, without violating section 4 of the act, establish its local rate by water to Portland, and could also concur in a new independent route established by the joint tariffs of the railroad whereby the route from San Francisco to North Portland was created, and that while the Steamship Company used part of the lines of the Railroad Company, it was lawful to make a local rate via water line higher than the point rate via the rail and water line. The accu-
104 racy of this reasoning depends upon whether the case is to be considered in recognition of the well established rule that by the amendments to section 4 of the Interstate Commerce Act, providing that the carrier has no right to charge more for a shorter haul over the same line or route than it charges for a longer haul, the shorter being included within the longer distance, the carrier cannot make such charge for the shorter haul until after it shall have presented the matter to the Interstate Commerce Commission and obtained from that body an order permitting the greater charge to the shorter point. Prior to the amendments of 1910, in the first instance, the carrier could under section 4 determine whether or not there was a dissimilarity of circumstances and conditions which authorized it to charge more for a shorter than for a longer haul over the same line. Since the Act of June 18, 1910, the right of the carrier in the first instance was taken away, leaving the prohibition of the long and short haul clause absolute until the Interstate Commerce Commission could hear the matter, and if it might see fit, make an order consenting to the higher rate to the intermediate point. In the Intermountain Rate Cases, 234 U. S. 476, 482, the court, speaking through the Chief Justice, after discussing the state of the law prior to and after the amendments, said: "It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified
105 except in so far as the section gives the right to the carrier to apply to the Commission for authority 'to charge less for longer than for shorter distances for the transportation of persons or property' and gives the Commission authority from time to time 'to prescribe the extent to which such designation common carrier may be relieved from the operation of this section.'" (United States vs. Louisville & Nashville R. Co., 235 U. S. 314; Skinner & Eddy vs. United States, 249 U. S. 566.) Inasmuch as no permission from the Interstate Commerce Commission was obtained by the carriers concerned in the present cases, the greater charge to the shorter point was prohibited by the statute referred to. It was an illegal rate, unless the effect of failing to obtain the consent of the Comission can be avoided by regarding the question as purely administrative, to be submitted first to the Interstate Commerce Commission before appeal lies to the judicial power. The later decisions of the Supreme Court (Penn. R. R. Co. vs. International Coal M. Co., 230 U. S. 184; Penn. R. R. Co., vs. Periton Coal Co., 237 U. S. 121; Penn. R. R. Co. vs. Sonman Coal Co., 242 U. S. 120), however,

point out the distinction between an assault against the rule of the statute and an unequal and discriminatory application of the rule. Recently, in St. Louis I. M. & S. R. Co., vs. Hasty & Sons, 255 U. S. 252, where it was contended that a proper interpretation of railroad tariff called for administrative consideration, the Court said that the matter was so free from doubt that it is was unnecessary to ap-
106 ply to the Commission for construction. The present case fairly illustrates the principle, for the question here involved is clearly not administrative as to what rate is reasonable, but whether under the circumstances already outlined, the only way provided for charging more for a short than for a long haul has been followed. If it has not there is a remedy by action in damages in court. (Sec. 9, Interstate Commerce Act.)

Counsel have argued that in the carriage from San Francisco to North Portland the line to North Portland is distinct from that to Portland, and they cite C. & N. W. Ry. vs. Osborne, 52 Fed. 912, as authority for their view that the local rate via water line or route could be higher than the joint rate via rail and water line or route. In the same case cited the Court was considering the fourth section of the Act to Regulate Commerce when it was unlawful for the carrier to charge greater compensation for transportation of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. Judge Brewer emphasized the use of the word "line" in the fourth section as it then read, and held that where two companies owning connecting lines of road unite in a joint tariff, they form for the connective rates, a new and independent line, and neither is bound to adjust its own legal tariff to suit the other, nor is it compelled to make a joint tariff with it. But, when Congress amended the Act in 1910, and saw fit to add after the words "over the same line" the additional words
107 "or route," it called for a new, and we believe, a broader interpretation by which the word "route" is not to be regarded as wholly synonymous with the word "line." We believe that something more was meant and that the effect was to require broader construction by regarding the words as pertaining to instances where carriers join their lines and then make a route; and that freight which is carried over the same route may be carried over a single line or a joint line. (R. R. Commission of Wisconsin vs. C. B. & Q. R. — U. S. —, Feb. 27, 1922.) We have here too the circumstances that the Oregon-Washington Railroad & Navigation Company controlled and operated the San Francisco and Portland Steamship Company.

In a brief filed by counsel as amicus curiæ it is urged that by section 206 of the Transportation Act of 1920 (U. S. Stat. 1920, p. 461), jurisdiction of claims against the Railroad Administration for violations of the Act to Regulate Commerce is taken from the courts and vested solely in the Interstate Commerce Commission. We cannot so hold. There is no language in the Transportation Act which indicates to us that Congress intended to make such a departure from the practice which had theretofore prevailed, and we believe that the

contrary intent is to be gathered from the provision of section 206 (*a*) which provides that actions at law, suits in equity, and proceedings in admiralty "of such character as prior to federal control could have been brought against such carrier may, after the termination of federal control, be brought against an agent designated by the
108 President for such purpose." There is also a further provision that such action may be brought "in any court which, but for federal control, would have had jurisdiction of the cause of action, had it arisen against such carrier." We find no ground for saying that the Transportation Act has changed the jurisdiction of any cause of action with respect to the subject matter, and inasmuch as the cases under examination could have been brought in court against the carrier if the lines had been under private control when the shipments were made, the causes of action can be maintained against the agent designated by the President, to recover where the shipments moved during the time the federal government was in control.

A further contention is that the increase in rates made by what is generally known as General Order 28, the order of the Interstate Commerce Commission which permitted the increases to go into effect and which permitted the carriers to violate the long and short haul clause in so far as necessary to permit the increase to go into effect, operated to make valid all violations of the long and short haul clause irrespective of whether or not the violation was caused by an increase in rate or had existed prior to such order and without authority of the Commission permitting the same. Counsel as amicus curiæ has urged this question but the plaintiffs in error did not raise it and it does not appear to have been considered by the lower court. It is, therefore, not for decision. In Robertson vs. B. & O. R. Co., 222 U. S. 511, the Supreme Court declined to take notice of
109 a decision of the Interstate Commerce Commission which was not mentioned in the pleading or in the agreed statement of facts. It may well be doubted, however, whether under the Federal Control Act (40 Stat. 451, sec. 10) Congress authorized the Railroad Administration to disregard the long and short haul clause without first applying to the Interstate Commerce Commission and obtaining the contemplated order relieving it. It is true that in certain instances by General Order No. 28, as to increase in rates, violations of the long and short haul clause were authorized. The effect was that where there had been a violation of section 4 before General Order No. 28 was in force, the increase of rates increased the extent of the violation, but the order did not legalize a violation by a carrier which had previously violated the section.

It is said that the steamers could unload sugar at the municipal pier, which is below the Ainsworth dock in Portland, and at such lower point transfer to the railroad company. But the rates to North Portland via Portland were established before any landing place other than Ainsworth dock was contemplated. Moreover, the tariffs of the Steamship Company provided that cargoes would not be taken or discharged other that at its regular landing place, which is Ainsworth dock in Portland, except at the option of the company.

Plaintiffs in error plead the statute of limitations as to certain of the claims. The Commerce Act, section 16, provides that all claims for the recovery of damages shall be filed within two years
110 after the cause of action has accrued and not after. Prior to the amendment of 1920 section 16 required all complaints for the recovery of damages to be filed within two years from the time the cause of action accrued and not after, and that a petition for the enforcement of an order for the payment of damages should be filed in the circuit court or state court within one year from the date of the order, and not after. The language of the statute puts the limitation period upon proceedings before the Commission, and not upon proceedings in court on the orders of the Commission. Phillips vs. Grand Trunk & Webster R. Co., 236 U. S. 664, cited by the plaintiffs in error, was an action instituted in court but it belonged to the class of cases which had to be instituted primarily before the Commission. Such a proceeding was instituted by one of the plaintiffs before the Commission, and the rate therein involved had been held to be unreasonable. Then, after the Commission rendered its decision, Phillips commenced a direct proceeding in court based upon the finding of the Commission in the other proceeding. The Court treated the inquiry and the finding of the Commission as general in its operation, and held that the proceedings inured to the benefit of persons having similar claims to those presented by the other persons, and that such others, after the decision of the Commission, could sue directly in court and that all persons who were required to go before the Commission primarily were affected by the statute of limitations as applied to the originator of the proceeding before the Commission. We do not understand the decision
111 as holding that the statute limits the proceedings before courts for the recovery of damages for violation of the Interstate Commerce Act. It is of significance that in the Act of 1920 there is no language of limitation against the shipper in recovering damages in the courts for violation of the act, and we regard it as fairly inferable that the statute of limitations remained as it was before 1920. This leaves the period of limitation to be determined by the statute of the state, in this instance the law of Oregon (sec. 6, Laws of Ore., 1920), which fixes the period of limitation for the recovery of a liability created by statute, other than a penalty or forfeiture, at six years. (C. & N. W. R. Co. vs. Ziebarth, 245 Fed. 336; Morrisdale Coal Co. vs. Penn. R. Co., 230 U. S. 304.)

Another point advanced by the plaintiffs in error is that the difference between the rate to North Portland and to Portland was improperly used as a measure of damages. The question is like that presented to this Court in California Adjustment Company vs. Southern Pacific Company, 237 Fed. 954, where it was held that the rule adopted by the District Court is the correct one.

In its essential respect the case of the Seed Company is covered by what we have said of the Parrington cases, where the rates appear to have been made in violation of the long and short haul clause. (United States vs. Louisville & Nashville R. Co., 235 U. S. 314, 320.)

The judgments of the District Court are affirmed, and in addition to the amounts allowed by that court as attorneys' fees, fees
112 for conducting the cases in this court are also allowed. (Mills vs. Lehigh Valley, 226 Fed. 812; N. Y., N. H. & Hartford vs. Ballou & Wright, 242 Fed. 862.) A reasonable fee in case #3799 in this court is $600; in case #3800, $1,000; and in case #3828, $100.

With these additions, the judgments are affirmed.

[File endorsement omitted.]

United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

**Judgment U. S. Circuit Court of Appeals.**

[Filed June 5, 1922.]

In Error to the District Court of the United States for the District of Oregon.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Oregon and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in
113 this cause be, and hereby is affirmed, with costs in favor of the defendant in error and against the plaintiff in error, and that an attorney's fee in the sum of $100.00 for services in the said Circuit Court of Appeals be, and hereby is allowed to counsel for the defendant in error.

It is further ordered and adjudged by this Court that the defendant in error recover against the plaintiff in error for his costs herein expended, and have execution therefor.

[File endorsement omitted.]

United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

**Order Staying Issuance of Mandate.**

[Filed June 17, 1922.]

Upon application of Mr. C. E. Cochran, counsel for the plaintiff in error, and good cause therefor appearing, ordered man-
114 date in the above entitled-cause stayed to and including Aug. 31, 1922, to enable counsel for the plaintiff in error to apply to the Supreme Court of the United States for the issuance of a writ of certiorari, and in the event the said petition is filed

with the Clerk of said Supreme Court within the time extended, said Mandate of this Court shall be stayed until after the Supreme Court passes upon the said petition for writ of certiorari. Wm. H. Hunt, United States Circuit Judge. Dated: June 17, 1922.

[File endorsement omitted.]

115 United States Circuit Court of Appeals for the Ninth Circuit.

[Title omitted.]

**Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and fourteen (114) pages, numbered from and including 1 to and including 114, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the plaintiff in error, and certified under section 3 of Rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

116 Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, in the State of California, this 16th day of August, A. D. 1922. F. D. Monckton, Clerk, by Paul P. O'Brien, Deputy Clerk. [Seal of United States Circuit Court of Appeals, Ninth Circuit.]

117 **Writ of Certiorari and Return.**

[Filed Dec. 20, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which James C. Davis, as Agent, United States Railroad Administration, is plaintiff in error, and The Portland Seed Company is defendant in error, No. 3828, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the District of Oregon, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Cir-

cuit Court of Appeals and removed into the Supreme Court
118 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the second day of December, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

119 [Endorsed:] File No. 29,123. Supreme Court of the United States, October Term, 1922. No. 573. James C. Davis, as Agent, etc., vs. The Portland Seed Company. Writ of Certiorari.

120 & 121 In the Supreme Court of the United States, October Term, 1922.

No. 573.

James C. Davis, Agent United States Railroad Administration, Petitioner,

vs.

The Portland Seed Company, Respondent.

**Stipulation.**

Because a Writ of Certiorari has been duly issued, dated the second day of December, 1922, in the above entitled action by the Supreme Court of the United States directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, requiring the record and proceedings in the aforesaid cause to be sent without delay to the said Supreme Court, it is

Stipulated and agreed by counsel for the respective parties that the transcript of record filed with the application for the writ of Certiorari may be taken as a return thereto and no new transcript made.

Dated at Portland, Oregon, this 14 day of December, 1922. C. E. Cochran, Counsel for Petitioner. James G. Wilson, Counsel for Respondent.

122 [File endorsement omitted.]

[File endorsement omitted.]